COPY

Office-Supreme Court, U.S.
FILED
JAN 3 1961
JAMES R. BROWNING, Clerk

No. 530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN L. R. EMMETT, JR., On Behalf of Himself and all Others Similarly Situated, *Petitioners*

v.

SUMNER G. WHITTIER, Administrator of Veterans Affairs, et al., *Respondents*

JAMES A. DEERING, On Behalf of Himself and all Others Similarly Situated, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

ROBERT H. MARBUTT, et al., Suing for Themselves and all Persons Similarly Situated, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENTS

JOHN GEYER TAUSIG
NATHANIEL F. BEDFORD
LAWRENCE A. SCHEI
Attorneys for Petitioners

BUTLER, KOEHLER & TAUSIG
1039 Investment Building
Washington 5, D. C.

JELSON, BEDFORD & HOFFIN
68 William Street
New York 5, New York

WHITE, HARRIS, FORT & SCHEI
923 Twelfth Street
Sacramento 14, California
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 538

HERMAN L. R. EMMET, JR., On Behalf of Himself and all Others Similarly Situated, *Petitioners*

v.

SUMNER G. WHITTIER, Administrator of Veterans Affairs, et al., *Respondents*

JAMES A. DEERING, On Behalf of Himself and all Others Similarly Situated, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

ROBERT H. MARRUTT, et al., Suing for Themselves and all Persons Similarly Situated, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF FOR THE RESPONDENTS

PRELIMINARY STATEMENT

Petitioners believe that the Brief For The Respondents in Opposition to the petition for writ of certiorari inescapably leads to the conclusion that the petition should be granted. This Reply sets forth the petitioners' reasons for that belief.

JURISDICTIONAL QUESTIONS PRESENTED

Respondents say that the Supreme Court should not review by certiorari the jurisdictional questions presented by the petition because the Court of Appeals also considered and correctly decided the cases at bar on the merits.

The National Service Life Insurance Act is an important federal statute. The determination by the Court of Appeals of the prerequisites for bringing suit under that statute involves a consequential question of statutory construction. The impact of this determination is not confined to the several thousand litigants here involved but, if allowed to stand, will have continuing future consequences for the millions of N.S.L.I. policyholders. The respondents do not deny this. For these reasons the jurisdictional provisions of the N.S.L.I. Act should be authoritatively construed by this Court even if the Court of Appeals had correctly decided the *Deering* and *Mabbatt* cases on their merits.

With respect to the *Emmet* case, the very reason suggested by respondents for denial of certiorari is inapplicable. Having held that mandamus would not lie in *Emmet*, the Court of Appeals ordered that case dismissed without deciding it on its merits; the Court of Appeals said "The way to reach these items [i.e. the claim for interest and attorneys' fees] is not by writ of mandamus.". Furthermore, petitioners' argument showing that the decision of the Court of Appeals on the mandamus issue is contrary to the controlling decisions of the Supreme Court has not been refuted by the respondents. If petitioners are correct about this issue, review by certiorari is essential to an exposition of this aspect of federal equity

jurisdiction and the correct judicial administration thereof.

LITIGATION COSTS AND ATTORNEYS' FEES

Respondents urge denial of certiorari principally because they say the District Court's allowance of petitioners' claim for litigation costs and attorneys' fees was considered on the merits and correctly reversed by the Court of Appeals. This is saying that such claim involves merely the private interests of the parties and that petitioners have had their "day in court". A matter of far greater importance is involved. If the reasons given by the Court of Appeals for the disallowance of the claim are contrary to the controlling decisions of *United States* v. *Equitable Trust Co.*, 283 U.S. 738 and *Sprague* v. *Ticonic Bank*, 307 U.S. 161, the power of equity in doing justice as between a party and the beneficiaries of his litigation has been impaired. In such circumstances, review by certiorari is essential for appropriate exposition and enforcement of that power.

Respondents endeavor to support the rejection of the claim by the Court of Appeals primarily with the allegation that petitioners' attorneys acted contrary to the interests of the veterans from whom they seek compensation by urging Congress that it was "unwise and unnecessary" to appropriate funds for the purpose of making refunds to the veterans, by objecting to the legislation which accompanied the proposed appropriation, by opposing the passage of H. R. 9369, by urging the President to veto Public Law 85-586, and by seeking a restraining order to prevent the Veterans Administration from making any refunds to the veterans under that statute. These charges of unethical prac-

tice are misleading "half truths" which were urged upon and rejected by the District Court and the Court of Appeals as grounds for the denial of the claim (R. 144, 153, 154) (Pet. 1a-14a).

The record shows that on August 2, 1957 the petitioners' attorneys advised Congress that they believed the requested appropriation was "unwise and unnecessary" because "As a result of our conferences [with officials of the Office of the United States Attorney for the District of Columbia and officials of the Veterans' Administration] it was and is our understanding that even if funds are made available to the Veterans' Administration through supplemental appropriation for the purpose of refunding the amounts illegally withheld from the veterans, no attempt would be made by the Government to make such refunds until the issues involved in the *Emmet* case have been finally resolved" (R. 135-139). Their objection to the proposed legislation accompanying the suggested supplemental appropriation was that it "would authorize the Veterans' Administration to make refund of amounts illegally withheld by the Government, without interest, which in our view of the matter, deprives the veterans of a relatively important right" (R. 138).

When the attorneys for the petitioners were advised that the V.A. sought the legislation to make immediate payment to entitled veterans without awaiting the outcome of this litigation, they did *not* oppose the enactment of H. R. 9369 but urged amendments thereto. That is why one of the stipulated facts for trial was that "Counsel for plaintiff and intervenors opposed the bill *as drafted* and sought amendments thereto which were not adopted *in the Act itself*." (R. 99). The attorneys initially sought amendments which

would: (1) make it clear that H. R. 9369 was not intended to foreclose the question of a veteran's entitlement to interest, but would leave that question for determination by the courts in this litigation; (2) provide that it would not be necessary for the veterans to make application for the refund within two years; and (3) provide that 90% of the amount each veteran was entitled to would be *paid immediately* and 10% withheld, pending determination of the amount, if any, to be allowed in the cases at bar for costs, litigation expenses and attorneys' fees (R. 141, 142). When counsel for the Government opposed such amendments, petitioners' attorneys proposed that if the requirement that the veterans make application for the refund within two years remained in H. R. 9369 as enacted, there should be included therein (4) a directive to the V.A. to notify each veteran involved of his right to file application. This fourth proposed amendment was also opposed by counsel for the Government but was effectively adopted by Congress by including it in a Senate Report rather than "in the Act itself" (R. 115, 116, 87-89).

The letter from the petitioners' attorneys to the President urging veto of P. L. 85-586 is not in the record. Since it is available to the respondents, it is fair to state that petitioners' attorneys thereby sought Presidential support for the amendments which they deemed necessary for the protection of the veterans and their interests.

The petitioners' attorneys did not seek a restraining order to prevent the V.A. from making *any refunds* to veterans under the statute. As the Supplemental Record discloses, they asked the District Court for an order restraining the V.A. from disbursing more than 90% of the payments authorized by P. L. 85-586 until

their claim for litigation costs and attorneys' fees had been finally adjudicated.

It is thus seen that there is no foundation for respondents' allegation that the rule of *Sprague* does not support the allowance of the claim inasmuch as there are "dominating reasons of justice" which preclude its allowance.

Respondents also say *misleadingly* that petitioners' attorneys contend "that *their efforts in Plesha* bring them within the rule that a party's creation, preservation or maintenance of a well-defined fund for the benefit of a group, entitles him to reasonable fees from all beneficiaries" (Resps'. Brief p. 10); and that this contention should not be reviewed by certiorari because the Court of Appeals was correct in holding that the efforts in *Plesha* did not create a fund and thus make the *Sprague* rule applicable. We submit that respondents know they have stated inaccurately the contention of petitioners' attorneys. Their contention is that they are entitled to reasonable fees because their efforts in *Plesha coupled with* their efforts in these class actions created the fund required by the *Sprague* rule. The questions whether such *combined efforts* created the fund and whether a fund created in such a manner brings the claim for litigation costs and attorneys' fees within the *Sprague* rule—both of which the Court of Appeals failed to answer directly—are important questions which make these cases "certworthy".

CLASS ACTIONS

The petition urges that review by certiorari is essential to clear away the confusion which exists with respect to class actions and thus reestablish the effectiveness of the class action device. The respondents' brief

confirms such confusion and the need for action by this Court.

The Government urged the Court of Appeals to hold that these cases were "spurious" rather than "hybrid" class actions. The opinion of the Court of Appeals establishes that it considers the *Deering* and *Mabbutt* cases to be class actions, for otherwise its holding that those cases will save from the operation of the statutes of limitation those similarly situated veterans who do intervene before judgment is inexplicable. Now the respondents contend that the Court of Appeals erred and that those cases are not even "spurious" class actions under F. R. Civ. P. 23(a)(3) because "it is apparent that the claims of the veterans did not present a common question of law or fact since they were subject to different defenses, e.g., statute of limitations, voluntary payment, and *res judicata*" (Resps.' Brief p. 10, footnote 7). The mere statement of the respondents' contention establishes that two of the highest legal officials of the Government, the Solicitor General and an Assistant Attorney General, are badly confused about class actions.

Moreover, respondents are obviously in error and apparently attempting to confuse the issues in the cases at bar when they say that the claims of the several thousand similarly situated veterans represented herein are subject to the defenses of voluntary payment and *res judicata*. None of the represented veterans made payment to the Government upon demand and none of them paid as a result of judgments; their money was taken from them by offset against disability compensation and N.S.L.I. dividends. Obviously, the defenses of voluntary payment and *res judicata* could not defeat their claims; and the suggestion that they could is made for the first time in these proceedings in respondents' brief.

Whether the Court of Appeals considered the *Doering* and *Mabbutt* cases to be "hybrid" or "spurious" class actions, its decision creates a true conflict of decisions between two Courts of Appeals, which can be effectively resolved by the Supreme Court alone, and should be promptly resolved. The respondents do not deny this.

INTEREST

The Statement in respondents' brief leaves the impression that petitioners demand interest on all benefits wrongfully withheld from the veterans, including interest on the disability compensation wrongfully withheld from the several thousands similarly situated veterans represented in these class actions. Petitioners seek 3% per annum interest *only* on the National Service Life Insurance dividends misappropriated from the "permanent trust fund . . . known as the National Service Life Insurance Fund".

Respondents say that the short answer to this claim "is that the right to interest from the Government can only arise from 'express' statutory consent, not by implication or by use of ambiguous language" (Resps' Brief p. 11). This is tacit acknowledgement that the Court of Appeals held that when a statute makes the United States a trustee of a trust fund which, by express terms of the trust instrument, bears interest for the beneficiaries [so long as the fund remains in trust], the United States is not liable for interest on monies misappropriated by it from the trust unless the trust instrument expressly so provides. The respondents do not deny that this holding is contrary to the controlling decision of *United States* v. *Mille Lac Band*, 229 U. S. 498; that it raises the substantial question whether only that part of the law of trusts expressly set forth in the

N.S.L.I. Act governs the United States, as trustee, in the administration of the trust fund created thereby; that it also raises a similar question with respect to each of the many trust funds of which the United States has been made trustee by statute; and that review by certiorari would be in the interest of the appropriate exposition and enforcement of this aspect of the law.

The respondents, as District Court defendants, took the position that Public Law 85-586 left *in statu quo* any legal right which petitioners might have to interest under the National Service Life Insurance Act. As appellants they urged that any such right to interest had been revoked by P. L. 85-586 which authorizes refund "without interest"; respondents' brief discloses that they believe the Court of Appeals has so held. If it has, the holding is contrary to the controlling decision in *Lynch* v. *United States*, 297 U.S. 571, and a substantial constitutional question is involved, which further establishes the "cert-worthiness" of the cases at bar.

Respectfully submitted,

JOHN GEYER TAUSIG
NATHANIEL F. BEDFORD
LAWRENCE A. SCHEI

Of Counsel:

BUTLER, KOEHLER & TAUSIG
1039 Investment Building
Washington 5, D. C.

JILLSON, BEDFORD & HOPPEN
68 William Street
New York 5, New York

WHITE, HARBER, FORT & SCHEI
923 Twelfth Street
Sacramento 14, California